Sun Holding (Sun Park Hotel) Co Ltd & Ors v Export-Import Bank of Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–341–02 OF 2014
ABDUL WAHAB PATAIL, HAMID SULTAN AND UMI KALTHUM JJCA
28 MAY 2015

Contract — Building agreement — Agreement — Financing project to build hotel in Laos — Whether there was default in repayment of obligations — Whether default caused by breach of oral collateral agreement and representation — Whether borrower induced to enter facilities — Counterclaim for remedies in relation to breaches of duty of care — Disposal of security for term loan facilities — Whether remedies sought within jurisdiction of courts in Laos

The appellants, Cheok Tiam Cheng and Cheok Soon Guan were the first, third and fourth defendants in a civil suit in the High Court commenced by the respondent to recover amounts outstanding under two term loan facilities ('the facilities') granted to the first appellant as borrower, and guaranteed by the second, third and fourth defendants, to part finance the appellants' project to build a hotel and a tourist complex in Vientiane in the People's Democratic Republic of Laos ('Laos'). The second defendant, a guarantor of the first appellant was adjudicated a bankrupt by the High Court and had remained an undischarged bankrupt. Hence, the claim proceeded against the first, third and fourth defendants. They now appeal as the first, second and third appellants ('the appellants'). The appellants filed a defence and counterclaimed that they did not dispute they had defaulted on their repayments obligations; but maintained that the default was caused by the respondent's breach of an oral collateral agreement and representation which induced the first appellant to enter into the facilities; and counterclaimed for remedies in relation to breaches of duty of care in relation to the disposal of the security for the term loan facilities. The respondent responded that the remedies sought by the appellants were within the jurisdiction of courts in the Laos. The High Court allowed the respondent's claim and dismissed the appellants' counterclaim. Hence, the present appeal:

Held, dismissing the appeal with costs RM10,000:

(1) The parties are bound by the terms of their contract as expressed in their agreement, and alleged oral agreements are nothing more than a common layperson attempt to circumvent the terms of their contract. That such agreement is invariably 'oral', testifying to the fact the parties

could not put it into writing, only means it could not be done. The grounds of judgment correctly appreciated that the letter of offer stated that as to amount, it was 'Subject to the availability of funds, the bank shall make available a maximum amount of United States Dollars Fourteen Million (USD14m) only or 85% of the project cost or contract value, whichever is lower' and this was reflected at cl 2.1 of the facility agreement and cl 2.1 of the additional facility agreement. The written agreements showed that the respondent had only agreed to part finance the total costs of the project subject to a maximum amount of USD28m total only (see paras 1 & 14–16).

(2) It was evident that there were a number of matters on the statements the appellant were dissatisfied with. The complaint was the respondent had not produced any other evidence to substantiate its claim. On the face of it, this appeared to be true. But upon closer scrutiny, there was the evidence of PW1 who was available for cross-examination and indeed he was cross-examined. He explained the two statements. He candidly did not dispute errors in earlier statements. He explained they were replaced by the second statement of accounts. The High Court was correct, therefore, to conclude that the appellants failed to successfully challenge the first and the second statement of accounts and that they remained conclusive evidence of the appellants' indebtedness (see para 32).

(3) There was no merit in the submission that because an amount claimed in a statement of claim differs from the amount claimed, the claim must fail. The litigation by definition a fair and just process for the resolution of a dispute between the parties as to what if any was due to a claimant. Such fair and just resolution was achieved by determination on the evidence adduced and tested before the court so that decision can be made, on the standard of a balance of probabilities, upon facts that were safe to be accepted as true and correct from the evidence so adduced. A defence comprising of display in the weaknesses of the other party's evidence may reduce the weight of that evidence, but if there was no evidence adduced that no amount was due, it could not justify dismissal of the claim entirely (see para 34).

(4) The answer by PW1 that the respondent did not have to obtain a valuation report was not inconsistent with the facility agreements which did not include a requirement to first obtain a valuation report. If such provision was included it would raise the associated questions of the qualifications, selection and appointment of the valuer, and unacceptable to a lender as it would handicap the freedom of the lender to resort to the security for its purpose (see para 41).

(5) The full and entire benefit of the appellants, of the present and future rights, title and interest in, to and under the master agreement and the land lease agreement having been assigned to the respondent as security

means that respondent, unlike in an order for sale required in foreclosure actions on land charged under the National Land Code, did not require an order of court for the disposal of the security in the Republic of Laos (see para 45).

[Bahasa Malaysia summary

Perayu-perayu, Cheok Tiam Cheng dan Cheok Soon Guan ialah defendan-defendan pertama, ketiga dan keempat dalam guaman sivil di Mahkamah Tinggi yang dimulakan oleh responden untuk mendapatkan semula baki terjumlah di bawah dua kemudahan pinjaman berkala ('kemudahan tersebut') yang diberikan kepada perayu pertama sebagai peminjam, dan dijamin oleh defendan-defendan kedua, ketiga dan keempat, untuk membiayai sebahagian daripada projek perayu-perayu membina sebuah hotel dan kompleks pelancong di Vientiane di Republik Rakyat Demokratik Laos ('Laos'). Defendan kedua, penjamin perayu pertama telah diadili sebagai seorang bankrap oleh Mahkamah Tinggi dan masih kekal seorang bankrap yang tidak dilepaskan. Justeru, tuntutan itu dimulakan terhadap defendan-defendan pertama, ketiga dan keempat. Mereka kini merayu sebagai perayu-perayu pertama, kedua dan ketiga ('perayu tersebut'). Perayu-perayu telah memfailkan pembelaan dan menuntut balas bahawa mereka tidak mempertikaikan bahawa mereka telah gagal dalam tanggungjawab mereka membayar balik; tetapi menegaskan bahawa kegagalan itu disebabkan oleh pelanggaran responden terhadap perjanjian kolateral secara lisan dan representasi itu telah mempengaruhi perayu pertama untuk memasuki kemudahan tersebut; dan menuntut balas untuk remedi berkaitan pelanggaran kewajipan berjaga-jaga berkenaan pelepasan jaminan untuk kemudahan pinjaman berkala. Responden menjawab bahawa remedi-remedi yang dipohon oleh perayu-perayu adalah dalam bidang kuasa mahkamah di Laos. Mahkamah Tinggi telah membenarkan tuntutan responden dan menolak tuntutan balas perayu-perayu. Justeru, rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Pihak-pihak terikat oleh terma-terma kontrak mereka sepertimana dinyatakan dalam perjanjian mereka, dan perjanjian lisan yang dikatakan tidak lebih daripada orang biasa mencuba untuk memintas terma-terma kontrak mereka. Perjanjian sedemikian selalunya 'oral', memberi keterangan tentang fakta yang tidak boleh dinyatakan dalam tulisan oleh pihak-pihak itu, hanya bermaksud ia tidak boleh dilakukan. Alasan penghakiman jelas memahami bahawa surat tawaran yang menyatakan bahawa berhubung jumlah, ia adalah 'Subject to the availability of funds, the bank shall make available a maximum amount of United States Dollars Fourteen Million ('USD 14m') only or 85% of the project cost or contract value, whichever is lower' dan ini dinyatakan dalam fasal 2.1 perjanjian kemudahan dan fasal 2.1 perjanjian kemudahan tamabahan.

Perjanjian-perjanjian bertulis itu menunjukkan bahawa responden hanya bersetuju untuk membiayai sebahagian daripada kos keseluruhan projek tersebut tertakluk kepada jumlah maksimum USD28 juta sahaja (lihat perenggan1 & 14–16).

(2) Adalah jelas bahawa terdapt beberapa perkara atas penyata yang mana perayu tidak berpuas hati. Aduannya adalah responden tidak mengemukakan apa-apa keterangan lain untuk memperkukuhkan tuntutannya. Berdasarkan itu, ia kelihatan benar. Namun setelah diteliti, terdapat keterangan PW1 yang ada untuk pemeriksaan balas dan sememangnya dia telah diperiksa balas. Dia menjelaskan dua penyata itu. Dia secara terus terang tidak mempertikaikan kesilapan dalam penyata terdahulu. Dia menjelaskan penyata-penyata itu digantikan dengan penyata akaun kedua. Mahkamah Tinggi adalah wajar, dengan itu, untuk membuat kesimpulan bahawa perayu-perayu telah gagal untuk mencabar dengan jayanya penyata akaun pertama dan kedua dan bahawa ia masih keterangan konklusif keterhutangan perayu-perayu (lihat perenggan 32).

(3) Tiada merit dalam penghujahan itu bahawa kerana jumlah yang dituntut dalam penyata tuntutan berbeza daripada jumlah yang dituntut, tuntutan itu perlu gagal. Litigasi menurut definasi mewajarkan satu proses adil dan saksama untuk menyelesaikan pertikaian antara pihak-pihak berhubung hutang jika ada terhadap penuntut. Resolusi yang adil dan saksama telah dicapai melalui penentuan berhubung keterangan yang dikemukakan dan diuji di hadapan mahkamah agar keputusan boleh dibuat, atas piawai imbangan kebarangkalian, berdasarkan fakta yang selamat diterima sebagai benar dan betul daripada keterangan yang dikemukakan. Pembelaan yang terdiri daripada pendedahan kelemahan keterangan pihak lain boleh mengurangkan beban keterangan tersebut, tetapi jika tiada keterangan yang dikemukakan di mana tiada hutang yang perlu dibayar, ia tidak boleh mewajarkan penolakan tuntutan itu secara keseluruhan (lihat perenggan 34).

(4) Jawapan oleh PW1 bahawa responden tidak perlu memperoleh laporan penilaian tidak konsisten dengan perjanjian-perjanjian kemudahan yang tidak memasukkan keperluan untuk terlebih dahulu memperoleh laporan penilaian. Jika peruntukan sebegitu dimasukkan ia boleh menimbulkan pelbagai persoalan tentang kelayakan, pemilihan dan pelantikan penilai, dan tidak diterima oleh pemberi pinjaman kerana ia akan menjejaskan kebebasan pemberi pinjaman mendapat jaminan bagi tujuannya (lihat perenggan 44).

(5) Manfaat sepenuh dan keseluruhan kepada perayu-perayu, tentang hak, hak milik dan kepentingan sekarang dan masa hadapan, kepada dan di bawah perjanjian utama dan perjanjian pajakan tanah tersebut yang telah

diserah hak kepada responden sebagai jaminan bermaksud responden, tidak seperti dalam perintah untuk jualan yang dikehendaki dalam tindakan pelucuthakan ke atas tanah yang dicagar di bawah Kanun Tanah Negara, tidak memerlukan perintah mahkamah untuk melepaskan jaminan di Republik Laos (lihat perenggan 45).]

Notes

For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3869–3871.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Dobbs v National Bank of Australasia Ltd [1935] HCA 49; (1935) 53 CLR 643, HC (refd)

Hesperides Hotels Ltd & Anor v Muftizade [1979] AC 508, HC (refd)

K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors [1998] 4 MLJ 535; [1998] 4 CLJ 481, CA (refd)

KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201; [1994] 2 CLJ 480, SC (refd)

Krishnamurthy & Anor v The Malayan Finance Corp Bhd [1986] 2 MLJ 134; [1986] CLJ 170, SC (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)

Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97; [1993] 2 CLJ 283, SC (refd)

Potter v The Broken Hill Proprietary Company Ltd [1906] VLR 292; [1906] 3 CLR 479, HC (refd)

Royal British Bank v Turquand [1856] 119 ER 886, KB (refd)

Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited, The Bank of Tokyo Limited and Chekiang First Bank Limited [1985] AC 80; [1985] 2 All ER 947, PC (refd)

Tan Ah Tong v Perwira Habib Bank (M) Bhd [1998] 3 MLJ 778; [1998] 3 CLJ 833, CA (refd)

The British South Africa Company v The Companhia De Mocambique [1893] AC 602, HL, SC (refd)

Woodland Development Sdn Bhd v Chartered Bank; PJTV & Densun (M) Sdn Bhd [1985] 1 LNS 161, HC (refd)

Legislation referred to

Evidence Act 1950 ss 92, 102, 103, 104
Judicature Act [SA] O XXXVI r 1

National Land Code

Appeal from: Civil Suit No 22–351 of 2010, High Court of Seremban.

Alvin Tang (Ahmad Shahrizal Abdul Aziz with him) (Ranjit Ooi & Robert Low) for the appellants.
Karlos Israphil Bendlin (Nur Zahirah Badaruddin with him) (Amin Karlos) for the respondent.

Abdul Wahab Patail JCA:

[1] The appellants, Sun Holding ('Sun Park Hotel') Co Ltd, Cheok Tiam Cheng and Cheok Soon Guan were the first, third and fourth defendants in Civil Suit No 22-351 of 2010 commenced by the respondent, the Export-Import Bank of Malaysia Bhd ('the respondent') to recover amounts outstanding under two term loan facilities ('the facilities') granted to the first appellant as borrower, and guaranteed by the second, third and fourth defendants, to part finance the appellants' project to build a hotel and a tourist complex in Vientiane in the People's Democratic Republic of Laos.

[2] The second defendant, Dato' Cheok Thian Sang, a guarantor of the first appellant was adjudicated a bankrupt by the Seremban High Court on 5 March 2012 and had remained an undischarged bankrupt. Hence, the claim proceeded against the first, third and fourth defendants. They now appeal as the first, second and third appellants ('the appellants').

[3] The appellants filed a defence and counterclaim that they did not dispute they had defaulted on their repayments obligations; but maintained that the default was caused by the respondent's breach of an oral collateral agreement and representation which induced the first appellant to enter into the facilities; and counterclaimed for remedies in relation to breaches of duty of care in relation to the disposal of the security for the term loan facilities.

[4] The respondent responded that the remedies sought by the appellants were within the jurisdiction of courts in the Lao People's Democratic Republic.

[5] On 27 January 2014, the High Court allowed the respondent's claim and dismissed the appellants' counter-claim.

BACKGROUND

[6] The brief facts may be summarised as follows:

(a) the facilities were granted by the respondent to finance the construction of a hotel and tourist complex ('Tourist Complex') in Laos;

(b) in 2004, the two facilities totalling USD 28m was issued to the first appellant;

(c) the hotel was completed in 2004, but no work commenced on the tourist complex; and

(d) the facilities were terminated in 2009 and the property the subject of the counterclaim was sold.

[7] The structure of the appellants' tourist complex project is as follows:

(a) the Government of Laos PDR. granted to the first appellant concession for a hotel and a tourist complex project under a master agreement.

(b) the project was located on land alongside the Mekong River measuring 1km in length and approximately 175,808 sq meters in area. The Government of Laos granted to the first appellant a lease of 50 years under a land lease agreement dated 3 June 2004.

(c) the hotel was located upon land in the land lease.

(d) as security for the loan facilities:

(i) the first appellant under a deed of assignment, assigned absolutely to the respondent the full and entire benefit, present and future rights, title and interest in, to and under the master agreement and the land lease agreement;

(ii) the first appellant, by a mortgage agreement, created in favour of the respondent a mortgage under the laws of the Republic of Laos PDR over the fixed assets and developments developed or to be developed pursuant to the master agreement and land lease agreement ('the secured property').

(e) by letters dated 5 October 2004 and 6 October 2004, the Government of Laos PDR consented to and acknowledged the assignment of the master agreement and land lease agreement to the respondent.

[8] In their defence, the appellants maintained that the default in repayment of the facilities was caused by unlawful breaches of oral collateral contract and representation by officers of the respondent. They counter-claimed for damages in respect of alleged breach of duty of care in the disposal of the secured property provided as security.

[9] The key submissions for the appellants may be summarised as follows:

(a) the estimated cost of the project was USD 48m;

(b) the first appellant required financing of USD 40m;

(c) the respondent only extended two facilities of USD 14 each; and

(d) when on 25 November 2010,

(i) the respondent exercised its power of sale to sell the secured property to CAMCE for USD 36m when the true value of the secured property was USD 149.4m; and

(ii) in 2012, the hotel and hotel land which was part of the secured property were transferred to Masceana, 51% owned by the respondent, free of consideration, and who in 2013 advertised the hotel and hotel land for resale.

THE HIGH COURT DECISION IN RESPECT OF THE CLAIM

[10] The grounds of judgment of the High Court began with a descriptive summary of the facilities sought and extended, the ensuing civil suit between the parties, the background of the claim, the appellants' defence, and identified the issues before proceeding to making its findings on the issues:

(a) whether there was a collateral agreement between the parties; and

(b) whether there was representation made by the respondent.

[11] The alleged collateral agreement between the parties was, according to the second appellant Cheok Tiam Cheng ('DW1'), a director of Sun Holding, an oral agreement by Exim Bank's then general manager, Mohd Noordin Abbas, who had since resigned from the respondent. The oral agreement, according to DW1, stemmed from an explanation by Mohd Noordin Abbas that because of the single customer limit condition imposed by Bank Negara Malaysia, the respondent could not provide the USD 40m facility to first appellant/Sun Holdings all at once but it could do so in several tranches of USD 14m each through separate facility agreements.

[12] This indeed is the very foundation upon which the appellants' case is built. However, neither Mohd Noordin Abbas, nor without him, an officer of Bank Negara was called to testify to any single customer limit condition imposed by Bank Negara Malaysia, and if there were, how it could so patently be easily overcome by the same single customer taking several tranches of USD 14m each. The High Court correctly held that the duty was on the appellants, whose case depended for its success to that evidence to have called Mohd Noordin Abbas, see ss 102 and 103 of the Evidence Act 1950 . A subpoena could have been obtained to secure his attendance as a witness. This failure to call Mohd Noordin Abbas, as the High Court held, left a gap in the case for the appellants.

[13] The High Court was also correct to hold that the evidence of DW1 as to the alleged collateral agreement was intended to contradict, vary or add to what was expressly provided as terms in the facility agreement, and contrary to s 92 of the Evidence Act 1950:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

[14] It is trite in contract law that parties are bound by the terms of their contract as expressed in their agreement, and alleged oral agreements are nothing more than a common layperson attempt to circumvent the terms of their contract. That such agreement is invariably 'oral', testifying to the fact the parties could not put it into writing, only means it could not be done.

[15] The grounds of judgment correctly appreciated that the letter of offer stated that as to amount, it was 'Subject to the availability of funds, the bank shall make available a maximum amount of United States Dollars Fourteen million (USD14m) only or eighty five percent (85%) of the project cost or contract value, whichever is lower'. and this was reflected at cl 2.1 of the facility agreement and cl 2.1 of the additional facility agreement.

[16] The written agreements showed that the respondent had only agreed to part finance the total costs of the project subject to a maximum amount of USD 28m total only.

[17] The High Court referred to letters by the appellants, dated 19 August 2008, 15 August 2008, 15 November 2008, 5 March 2009, 14 April 2009, 23 April 2009 and 15 May 2009, signed at all times by DW1 which had never averred to any collateral agreement despite the opportunities or occasion to do so when responding to notices and demands due to the default in payments. The issue of existence of any collateral contract was only raised for the first time at trial by DW1. In our view, the High Court had correctly appreciated the facts to dismiss the testimony of DW1 as being very unlikely to be true as to the alleged collateral agreement and to hold that it was but a last minute attempt and an afterthought to avoid liability under the facility agreements.

[18] The appellants had alleged there were representations made by Exim Bank through its officers. According to DW1, that after receiving the solicitors' letter of demand dated 18 July 2008 he met with the respondent's then chief operating officer, Adissadikin Ali on several occasions between July and September 2008. It was alleged that Adissadikin Ali, aware that the respondent

had promised the first appellant/Sun Holdings additional financing to complete the tourist complex, requested DW1 to submit a formal application for an additional loan of USD20m which he would make sure for the respondent to approve. It was further asserted that Adissadikin Ali said that it would be foolish for the respondent not to grant the additional loan to Sun Holdings.

[19] Similarly, Adissadikin Ali was not called by the appellants as witness to testify as to the representation. His testimony became necessary because the letter of 15 September 2008 mentioned nothing of the alleged representation, and had referred to the default as resulting from ' ... under the present business situation of the hotel, we are unable to settle the repayment of the loan according to schedule'. That letter requested USD17m facility and to restructure the outstanding amount under the loan facilities.

[20] Without:

(a) calling Adissadikin Ali as a witness to confirm having made the representation;

(b) explanation for not calling him;

(c) elaboration of the then business situation of the hotel and an explanation how it could be an independent project not affected by the business conditions affecting the hotel; and

(d) explanation why if the representation was made in September 2008, the subsequent letter seeking USD20m was only issued on 15 November 2008.

there was no basis to ascribe any credibility or weight as to the existence of any such representation, and it would have been perverse to do so.

[21] Without evidence that there was any such representation the contemporaneous correspondence showed a borrower in default seeking USD 17m further facility and a request for further facility. Even if such an application for USD17m was being considered, the letter two months later dated 15 November 2008 increasing the sum required to USD 20m can only adversely affect any confidence the respondent might have had for the USD17m.

[22] The first appellant's response on 5 March 2009 seeking instead USD10m after receipt of letters of rejection dated 13 January 2009 and 26 February 2009 for the USD20m loans was the occasion to have raised the matter of any oral collateral agreement by Mohd Noordin Abbas and the similarly oral representation by Adissadikin Ali. The appellants' letter of 30

June 2010 dated after the termination notice by the respondent similarly made no mention of the alleged oral collateral agreement and oral representation of Mohd Noordin Abbas and Adissadikin Ali and explained the default as follows:

> 13 We have tried our very best to repay the loan but still fail to do so due to many circumstances affecting the business of hotel, such as the aviation flu, the closure of Bangkok airport, SARS, the financial crisis, the recent volcano eruption in Iceland and the political unrest In Thailand (Thailand is our main gateway for international tourists to fly into Laos) that causes our hotel to be slower than what we expected.

[23] We note that by cl 14.1 of the facility agreements, it is provided that default in making payment of repayments on due dates constituted an event of default, upon which the respondent was entitled to terminate the agreements and recall the whole outstanding amount.

[24] Without calling Mohd Noordin Abbas and Adissadikin Ali to testify that they had made the oral collateral agreement and the oral representation, the appellants failed to prove the key component of their defence and by extension the counterclaim. Without explanation why they were not called as witnesses attracts consideration of an adverse presumption that if called their testimony would be to the contrary. Be that as it may, it is essential to rule upon it since having failed to prove the existence of the oral collateral agreement and the oral representation, the appellants could not resort to the indoor management rule, generally known as the Turquand Rule established in *Royal British Bank v Turquand* [1856] 119 ER 886, and applied or referred in *Woodland Development Sdn Bhd v Chartered Bank; PJTV & Densun (M) Sdn Bhd* [1985] 1 LNS 161 by Gunn Chit Tuan J (as he then was), and by the Supreme Court in *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; [1993] 2 CLJ 283; *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201; [1994] 2 CLJ 480, the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793; and the Court of Appeal in *Tan Ah Tong v Perwira Habib Bank (M) Bhd* [1998] 3 MLJ 778; [1998] 3 CLJ 833; *K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors* [1998] 4 MLJ 535; [1998] 4 CLJ 481 and *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337.

[25] That being the case, there was nothing upon which a finding could be made that the termination by the respondent of the facility agreements was unlawful.

[26] As to the outstanding amount, we hold that the High Court was correct to rely on cl 19.1 of the facility agreements. It constituted the specific agreement of the parties that:

> In any proceedings relating to this Agreement, a statement as to any amount due to Exim Bank under this Agreement giving reasonable details of the basis of calculation or determination of that amount and which is certified as being correct by an officer of Exim Bank, shall, unless otherwise provided in this Agreement and in the absence of manifest error, be conclusive evidence that such amount is in fact due and payable.

[27] The law as to a conclusive evidence clause is as follows.

[28] In *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC), it was held:

> The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of Indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.
>
> ... A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid in Australia and England.

[29] In *Dobbs v National Bank of Australasia Ltd* [1935] HCA 49; (1935) 53 CLR 643, the High Court of Australia explained the nature and effect of conclusive evidence clause. It further explained the clause does not amount to an ouster clause that ousts the jurisdiction of the court, and therefore cannot be struck down as being contrary to public policy. The High Court of Australia does not appear to have needed to address the subject of the conclusive evidence clause again subsequently.

[30] Clause 19.1 was specifically worded as to its nature and intent to have a conclusive evidence clause. It meets the test applied by the judicial committee of the Privy Council in *Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited, The Bank of Tokyo Limited and Chekiang First Bank Limited* [1985] AC 80; [1985] 2 All ER 947.

[31] The High Court directed its mind to the submissions that:

(a) since both statements carried the same date, set out different figures, both in the particulars and in the total, certified by PW1, the first statement showing a sum of USD1,498,270.81 as at March 2013, and the second statement in November 2013 USD11,294,254.31, there was grave uncertainty as to which parts of either statement were in error without sight of the source documents, and the two statements were inherently unreliable and showed manifest error; and

(b) since further the respondent had not produced any other evidence to substantiate its claim, the respondent had failed to discharge the burden of proof upon it to prove its case upon the balance of probabilities.

[32] Considering the submissions, it was evident there were a number of matters on the statements the appellant were dissatisfied with. The complaint was the respondent had not produced any other evidence to substantiate its claim. On the face of it, this appeared to be true. But upon closer scrutiny, there was the evidence of PW1 who was available for cross-examination and indeed he was cross-examined. He explained the two statements. He candidly did not dispute errors in earlier statements. He explained they were replaced by the second statement of accounts. The High Court was correct, therefore, to conclude that the appellants failed to successfully challenge the first and the second statement of accounts and that they remained conclusive evidence of the appellants' indebtedness as at 31 August 2010 and 22 March 2013 respectively.

[33] The submissions for the appellants herein at the High Court went further, that since the amount in the statement of claim was higher than in the statements of account, the claim was invalid. We find no error on the part of the High Court to rely upon the Supreme Court case of *Krishnamurthy & Anor v The Malayan Finance Corp Bhd* [1986] 2 MLJ 134; [1986] CLJ 170 (SC) where it was held:

> In the first place, as regards the objections to the difference between the amount claimed and the amount to be signed in the judgment, we wholly agree with the view expressed by George J in his grounds of decision in that matter was fully explained by the respondent to the effect that credit had to be given for the value of cars which the respondents repossessed between the date of the writ and the date of the summons In chambers. We do not see any need to amend the statement of claim for the making of this adjustment.

[34] We would only add that there is no merit in a submission that because an amount claimed in a statement of claim differs from the amount claimed, the claim must fall. The litigation by definition a fair and just process for the resolution of a dispute between the parties as to what if any is due to a claimant. Such fair and just resolution is achieved by determination on the evidence adduced and tested before the court so that decision can be made, on the standard of a balance of probabilities, upon facts that are safe to be accepted as true and correct from the evidence so adduced. A defence comprising of display in the weaknesses of the other party's evidence may reduce the weight of that evidence, but if there is no evidence adduced that no amount is due, it cannot justify dismissal of the claim entirely.

THE HIGH COURT DECISION IN RESPECT OF THE COUNTERCLAIM

[35] In respect of the counterclaim by the appellants herein, the issues raised and remedies sought related to or arose from the sale of the secured property.

[36] In the light of the foregoing, we find no merit in the submission that the termination of the facilities were unlawful and the respondent was entitled to proceed to recover from disposal of the security. In our view, the High Court was correct in arriving upon the same reasoning.

[37] The only issue arose from the sale of the secured property.

[38] Before this court, it was submitted that there was a breach of its duty of care on the part of the respondent by (a) failing to ascertain the true value of the secured property prior to the sale, and (b) selling the secured property at USD 36m even though the true market value was USD149.4m.

[39] This issue was not addressed in the grounds of judgment of the High Court.

[40] The cross-examination of PW1 referred to by the appellants in its submissions, where PW1 agreed the bank had a duty to find out the true market value before negotiating a sale of a secured property, yet subsequently said the respondent did not have to procure a valuation report and that when it sold the secured property, it did so without the benefit of a valuation report.

[41] On the face of it, the argument put forward by the respondent appear reasonable. The answer by PW1 that the respondent did not have to obtain a valuation report was not inconsistent with the facility agreements which did not include a requirement to first obtain a valuation report. If such provision was included it would raise the associated questions of the qualifications, selection and appointment of the valuer, and unacceptable to a lender as it would handicap the freedom of the lender to resort to the security for its purpose.

[42] Be that as it may, while the loan was extended from Malaysia and subject to the Laws of Malaysia, the security and its disposal appear to be another matter.

[43] After the termination of the facility agreements, the respondent executed a memorandum of understanding dated 7 July 2010 ('MOU') with Krittaphong Group Co Ltd, incorporated in Laos PDR for the transfer of all the assigned rights, interest, benefit and title under the master agreement and land lease agreement. The company assigned all its rights and obligations under the MOU to Camce Investment (Lao) Co Ltd ('Camce') which then executed the sale and purchase agreement dated 25 November 2010 ('S&P') with the respondent for the sale of the secured property at the agreed consideration of USD36m.

[44] Notwithstanding the MOU with Krittaphong Group Co Ltd and the transfer of its rights and obligations under the MOU to Camce, the transaction by the respondent remained as the disposal of its security, at an agreed consideration of USD36m.

[45] The full and entire benefit of the appellants, of the present and future rights, title and interest in, to and under the master agreement and the land lease agreement having been assigned to the respondent as security means that respondent, unlike in an order for sale required in foreclosure actions on land charged under the National Land Code, did not require an order of court for the disposal of the security in the Republic of Laos PDR.

[46] Clause 6 of the land lease agreement and cl 7 of the master agreement stipulated that both agreements shall be governed by the laws of the Republic of Laos PDR. The disposal must, therefore, accord with the laws of the Republic of Laos PDR. Any misconduct in the disposal is committed in the Republic of Laos PDR. The High Court was, therefore, correct to hold that the issues raised and remedies sought in the counterclaim relate to or arises from the sale of the secured property, and therefore the appellants' counterclaim ought to be adjudicated before the courts in Laos PDR, see *The British South Africa Company v The Companhia De Mocambique* [1893] AC 602 (HL) where it was held that the Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad and the rules of procedure under the Judicature Acts with regard to local venue (Order XXXVI r 1) did not confer any new jurisdiction.

[47] Submissions that the respondent's actions usurped the first appellant's rights to the secured property and its rights to develop the secured property hold no merit in view of the absolute assignment. The alternative pleading was that the respondent conspired with CAMCE to undervalue in order to hold an indirect majority interest in the management of the hotel. The High Court referred to *Hesperides Hotels Ltd & Anor v Muftizade* [1979] AC 508, and held that the appellants must prove the respondent's alleged infringements of the appellants' rights under the master agreement and land lease agreement and to the secured property under the laws of the Republic of Laos PDR.

[48] Lord Wilber force in the House of Lords, at p 534, quoted with approval Dicey & Morris, *The Conflict of Laws*, (9th Ed) as follows:

> Subject to exceptions hereafter mentioned, the court has no jurisdiction to entertain an action for (1) the determination of title to, or the right to the possession of, any immovable situate out of England (foreign land); or (2) the recovery of damages for trespass to such immovable.

[49] We considered the question whether the ground of breach of duty of care in the disposal of the secured property may be considered an action in personam and may constitute an exception to the ratio in *The British South Africa Company v The Companhia De Mocambique*. On further consideration, we observed that it was a specific stipulation by cl 6 of the land lease agreement and cl 7 of the master agreement that both agreements shall be governed by the laws of the Republic of Laos PDR. In the event, we cannot hold that the High Court so erred in holding that a Malaysian court has no jurisdiction to inquire into the validity of the acts and decision of the Government of Lao PDR in approving the transfer of rights under the master agreement and land lease agreement by the respondent. We agree that to do so goes against the established principles of international law and the comity of nations (see *Potter v The Broken Hill Proprietary Company Ltd* [1906] VLR 292; [1906] 3 CLR 479). The High Court of Australia held it was not competent for the court of one state to examine into the validity of an act purporting to be done by the supreme authority of another state in the exercise of its sovereign or quasi-sovereign powers, and the grant of a patent right being such an act, the Victorian court had no jurisdiction to deal with the plaintiff's said claims.

[50] Furthermore, the first and second appellants had, in an action by the respondent, accepted the jurisdiction of the People's Court in Vientiane Capital, where in a people's judgment dated 10 February 2012 the people's court had decided that the respondent had lawfully exercised its rights. That decision was affirmed on appeals to the Lao's appellate court and its Supreme Court.

[51] The appellants, and for that matter the respondent, having accepted the jurisdiction of the courts of the Republic of Laos over the dispute between the parties in respect of rights over the Hotel and the issue of compensation cannot relitigate the same matter under the guise of a counterclaim for breach of a duty of care in respect of disposal of the secured property that has already been litigated to finality in the courts of the Republic of Laos.

[52] For completeness, allegation of fraud and negligence was raised arising from the sale at USD36m when the market value was between USD69.946m and USD71m. Needless to say, the proof of fraud is upon the standard of beyond reasonable doubt, and the burden of proof of fraud and negligence is upon the appellants (see ss 102 and 104 of the Evidence Act 1950). However, the official committee comprising officials from the relevant authorities and bodies set up by the Government of Laos PDR pursuant to the judgement of the People's Court had valued the hotel (including furniture and other materials) at USD23m, which valuation was subsequently certified by its Ministry of Justice.

[53] In the circumstances, therefore, even if the courts in Malaysia were to inquire, contrary to *Potter v The Broken Hill Proprietary Company Ltd*, into fraud and negligence, the decision of the official committee and the certification by the Ministry of Justice as to the value renders the grounds of fraud and negligence to be without merit in fact.

[54] For the foregoing reasons, the appeal was dismissed with costs fixed in the sum of RM10,000 and deposit ordered to be paid out on account of costs to the respondent.

Appeal dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor